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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-937

NADINE LOUIS, CYNTHIA MOORE, FRANK WEIR, KATHY HORTON, CONSTANCE JONES, VALERIE KERSEY, PATRICIA WALKER and the WEST PHILADELPHIA BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Petitioners,

v.

THE PENNSYLVANIA INDUSTRIAL DEVELOPMENT AUTHORITY; THE DELAWARE COUNTY INDUSTRIAL DEVELOPMENT CORPORATION; and the CHILTON COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-

NADINE LOUIS, CYNTHIA MOORE, FRANK WEIR, KATHY HORTON, CONSTANCE JONES, VALERIE KERSEY, PATRICIA WALKER AND THE WEST PHILADELPHIA BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Petitioners,

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THE PENNSYLVANIA INDUSTRIAL DEVELOPMENT AUTHORITY; THE DELAWARE COUNTY INDUSTRIAL DEVELOPMENT CORPORATION; AND THE CHILTON COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Nadine Louis, Cynthia Moore, Frank Weir, Kathy Horton, Constance Jones, Valerie Kersey, Patricia Walker and the West Philadelphia Branch, National Association for the Advancement of Colored People hereby petition that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on October 11, 1974.

I. OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 371 F. Supp. 877 (E. D. Pa. 1974) and is printed in the Appendix, *infra*, pp. A1-A21. The judgment-order of the Third Circuit Court of Appeals is not reported but is printed in the Appendix, *infra*, pp. A22-A23. The order of the Third Circuit Court of Appeals denying rehearing *en banc* is also unreported but is printed in the Appendix, *infra*, p. A24.

II. JURISDICTION.

The judgment-order of the Court of Appeals for the Third Circuit was entered on October 11, 1974. A timely filed petition for rehearing *en banc* was denied on October 31, 1974. This Petition is filed within 90 days of the latter date. The jurisdiction of this Court to review the Court of Appeals' judgment-order by Writ of Certiorari is invoked under 28 U. S. C. §1254(1).

III. QUESTIONS PRESENTED.

1. Does the Fourteenth Amendment to the United States Constitution require Pennsylvania to investigate and consider whether it is subsidizing employment discrimination by financing businesses which discriminate against Blacks?

2. Do Black plaintiffs who were either rejected or discharged from a company which received a substantial state loan to create jobs have standing to challenge Pennsylvania's disregard of whether that company and other loan recipients discriminated in employment against Blacks?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. United States Constitution.

a. Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Statutory Provisions.

a. Civil Rights Act of 1871, 42 U. S. C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

b. Pennsylvania Industrial Development Authority Act of 1956, Pa. Stat. tit. 73, § 302.

* * *

. . . [I]t is hereby declared to be the policy of the Commonwealth of Pennsylvania to promote the health, safety, morals, right to gainful employment, business opportunities and general welfare of the inhabitants thereof

by the creation of a body corporate and politic to be known as "The Pennsylvania Industrial Development Authority" which shall exist and operate for the public purpose of alleviating unemployment with its resulting spread of indigency and economic stagnation by the promotion and development of industrial and manufacturing enterprises and research and development facilities in those areas of the Commonwealth in which conditions of critical unemployment currently or may from time to time exist. Such purposes are hereby declared to be public purposes for which public money may be spent.

V. STATEMENT OF THE CASE.

A. Factual Background.

This is a case of State indifference to its participation in private racial discrimination. It involves the long-standing refusal of the Commonwealth of Pennsylvania to investigate whether its subsidy of private industry, through reduced interest loans, is, in fact, a State subsidy of employment discrimination against blacks.

The State agency responsible for this policy is the Pennsylvania Industrial Development Authority ("PIDA"). Since 1956, PIDA has admittedly lent hundreds of millions of dollars of public funds, virtually interest free, to private businesses in complete disregard of the recipient companies' employment policies towards blacks. In defense of its indifference, PIDA has pleaded that it has *no* responsibility to assure its non-involvement with businesses which practice racial discrimination in their employment policies. PIDA's narrow view is that it need only follow the requirements of the Pennsylvania Industrial Development Authority Act, Pa. Stat. tit. 73, Section 301

et seq. and that, if it has any Fourteenth Amendment responsibilities, they do not include an inquiry into the employment practices of its subsidized loan recipients.

PIDA was created by statute on May 17, 1956 for the purpose of "alleviating unemployment with its resulting spread of indigency and economic stagnation." Pa. Stat. tit. 73, Section 302. To implement this statutory purpose, PIDA provides low-interest loans to "industrial development agencies" which have made loan applications on behalf of businesses which desire to expand and/or relocate into "critical economic areas" of the Commonwealth, Pa. Stat. tit. 73, Section 306. As of January 5, 1972, the interest rate on a PIDA loan was seven-eighths of one percent.[1]

Each industrial development agency applying for a PIDA loan is required to submit, on an application form developed by PIDA, pertinent information relating to the proposed industrial development project. However, the only information sought about the applicant company's employees is:

> A general description of the type, classes and number of employees employed or to be employed in the operation of the industrial development project. Pa. Stat. tit. 73, Section 307(d).

Although PIDA is required by statute to carefully examine each loan application prior to approving a particular project, Pa. Stat. tit. 73, Section 307, it has never required an industrial development agency to include on the application any information concerning the number of blacks (or

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1. In effect, the PIDA loan is a second mortgage loan. A first mortgage loan for the financing of the project is normally obtained from a private lending institution. The latter loan, moreover, is normally contingent on PIDA's approval of the company's loan application to it.

other minorities) employed at the applicant company. Nor has PIDA required the applicant company to disclose what its recruitment, hiring or promotion policies are or whether they adversely affect blacks. The employment discrimination of applicant and recipient companies, according to PIDA, is irrelevant to its statutory obligations.

B. PIDA's Loan to the Chilton Company.

The Chilton Company is a Delaware Corporation engaged in the business of publishing and printing books and magazines and doing market and opinion research for governmental agencies and private industry. For many years, Chilton's principle office was located in the heart of West Philadelphia, where blacks comprise approximately 97% of the population.

In 1971, Chilton decided to relocate several of its Pennsylvania offices, including its West Philadelphia facility, and to expand its operations into a larger, central building to be constructed in Newtown Square, Delaware County, Pennsylvania. As a result, the company requested the Delaware County Indstrial Development Corporation ("DCIDC"), a local industrial development agency, to file a loan application on its behalf with PIDA in the amount of $2,600,000. DCIDC complied with that request and on June 23, 1971 the application was filed.

PIDA, however, declined to approve that loan request because it determined, after an examination of the application, that Chilton was relocating its offices from one "area" of the Commonwealth (i.e. Philadelphia) to another (i.e. Newtown Square) in violation of the PIDA Act, Pa. Stat. tit. 73, Section 307(k). To have approved that request would therefore have exacerbated unemployment in the Philadelphia "area". Consequently, on July 30, 1971 DCIDC amended the Chilton application and requested $4,080,000 to finance 40% of the cost of a new facility to be

constructed this time at a proposed site located in Radnor Township, Pennsylvania.

Radnor Township is a predominantly white suburb of Philadelphia. Its black population is estimated at 2.1%. Nonetheless, because it was considered part of the Philadelphia "area" for purposes of the PIDA Act, Chilton's amended loan application was approved by PIDA in a letter of commitment dated February 2, 1972.

Both prior and subsequent to the approval of the Chilton loan, not only petitioners' counsel, but the Pennsylvania Human Relations Commission as well, attempted to have PIDA re-examine that loan, in light of the effects it would have, *inter alia*, in exacerbating black unemployment and involving the Commonwealth in the employment discrimination of the Chilton Company. However, consistent with its policy of disregarding the discrimination of its loan applicants, PIDA ignored those requests and refused to require any information from Chilton concerning its employment practices towards blacks.

C. The Proceedings Below.

It was against this backdrop that the plaintiffs commenced this litigation on April 20, 1972 in the United States District Court for the Eastern District of Pennsylvania. Suing as black citizens and as individuals either denied or discharged from employment at the Chilton Company, the seven individual plaintiffs and the West Philadelphia Branch of the National Association for the Advancement of Colored People sought to restrain all PIDA loans, including the Chilton loan, until such time as PIDA developed and applied standards and procedures to ensure that Pennsylvania would not continue to subsidize businesses discriminating in employment against blacks.

The Complaint was framed in four Counts. However, it was only on Count I that a hearing was initially requested

and held. That Count alleged that PIDA had neither investigated, nor considered legally relevant, the racial discrimination which was practiced by the recipients of its loans. The remaining three Counts alleged that Chilton had pursued a course of employment discrimination against the plaintiffs and other similarly situated blacks. On those allegations, no hearing was held primarily because the plaintiffs and Chilton executed a comprehensive, court-approved Consent Decree on October 2, 1972. That Decree provided, *inter alia*, for hiring and promotion goals for minorities at Chilton, money damages to the named plaintiffs, busing for employees desiring transportation assistance to the new Radnor Township facility, and an expert to monitor the settlement.

At the consolidated preliminary and final injunction hearing held on Count I, the plaintiffs presented unrebutted testimony that PIDA refused to consider whether recipients of its loans were discriminating in employment against blacks. In addition, they also proved with respect to the Chilton Company that PIDA had failed to consider the following:

> (a) That blacks represented only 16% of the company's employees working at its main office in West Philadelphia and only 1.6% of its employees at its second largest office located in Bala Cynwyd, a suburb of Philadelphia. Furthermore, 77% of all Chilton's black employees were concentrated in office and clerical, unskilled laborer, and service worker jobs;
>
> (b) That as a result of an investigation by the Pennsylvania Human Relations Commission of 13,000 Pennsylvania employers, Chilton was determined to rank as the 23rd worst in terms of employment discrimination in the state and thus was placed on a list of 85 employers targeted for future enforcement action;

(c) That the United States Defense Supply Agency, with which Chilton had federal contracts, had twice rejected affirmative minority hiring plans submitted to it by Chilton for non-conformance with federal requirements;

(d) That the Suburban Action Institute, a New York based citizens-action group, had filed a complaint of racial discrimination against Chilton with the United States Equal Employment Opportunity Commission alleging not only hiring and promotion bias against blacks, but as well, the discriminatory effect of the company's relocation to Radnor Township; and

(e) That the Attorney General's office of the Commonwealth of Pennsylvania actively opposed the Chilton loan because, in part, it would make the State a joint-venturer with a racially discriminatory company. Consequently, it requested PIDA to include in its contract with Chilton a provision that the company begin hiring minorities at a ratio of one minority for every one white until racial parity was achieved.

On January 18, 1974, the District Court entered an opinion in which it denied relief to the plaintiffs on Count I because they failed to offer proof of discrimination at Chilton (App. A, pp. A5-A8). It also held that the plaintiffs lacked Article III standing to sue (App. A, pp. A7-A8). The Court of Appeals for the Third Circuit affirmed in a one-sentence judgment-order entered on October 11, 1974 (App. A, pp. A22-A23). The panel's order, however, did note that it had "some doubts" about the District Court's holding that the plaintiffs lacked standing to commence the litigation. A timely petition for reconsideration *en banc* was denied by the Court of Appeals in an order entered on October 31, 1974 (App. A, p. A24).

VI. REASONS FOR GRANTING A WRIT OF CERTIORARI.

A. The Judgment-Order of the Court of Appeals Directly Conflicts With Principles Established by This Court Requiring State Governments to Ensure Their Non-Participation With Businesses Which Discriminate Against Blacks.

The petitioners' case on Count I of their complaint rested on the well settled constitutional principle that it is the obligation of the State, in the first instance, to ensure that its subsidization of private industry does not cause it to become a joint-venturer with companies which discriminate against blacks. *See*, e.g., *Norwood v. Harrison*, 413 U. S. 455, 463-471 (1973), *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163, 173 (1972), *Cooper v. Aaron*, 358 U. S. 1, 9 (1958). In evidentiary terms, this required the petitioners to prove that Pennsylvania abdicated its responsibilities by refusing to consider whether the recipients of its loans were discriminating in employment against blacks. *Norwood v. Harrison, supra*, 413 U. S. 463-471, *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 725 (1961). The petitioners sustained this burden, and the respondents candidly admitted they were unable to rebut it.

The District Court, however, affirmed by the Court of Appeals, required the petitioners to prove discrimination against blacks by Chilton as a precondition to securing injunctive relief against PIDA and DCIDC (App. A, p. A9).[2] In so deciding, both courts misinterpreted the constitutional

2. As petitioners stated at page 8, *supra*, the allegations of discrimination by Chilton were contained in Counts II-IV of their complaint. No trial was held on those Counts primarily because of the entry of the Consent Decree executed between the parties on October 2, 1972. The trial that was conducted related, therefore, only to the allegations of Count I which were directed against PIDA and DCIDC.

role of Pennsylvania in the area of race relations and thus created an irreconciliable conflict with prior decisions of this Court.

For example, in *Norwood v. Harrison, supra,* Mr. Chief Justice Burger, writing for a unanimous court, held that a Mississippi statutory program, under which textbooks were purchased by the State for free distribution to students in both public and private schools, was unconstitutional because the State failed to consider whether the participating schools discriminated against blacks. There, as here, there was no statutory requirement for such a consideration. Yet, the Chief Justice wrote:

> . . . a State's special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools *without regard* to constitutionally mandated standards forbidding state-supported discrimination. *Id.* at 463. (Emphasis added.)

To remedy Mississippi's indifference, the Court delineated certain minimal constitutional requirements to which schools had to adhere as a condition to their participation in the textbook distribution program. *Id.* at 471.[3]

The result reached in *Norwood* was the latest in a range of decisions of this Court defining the affirmative role each state must play to ensure its non-participation "through any arrangement, funds or property", *Cooper v. Aaron, supra,* 358 U. S. at 9, in the racially discriminatory prac-

3. The Chief Justice's opinion in *Norwood* required Mississippi to adopt a certification procedure with which each participating school had to comply.

> . . . [E]ach school . . . should, among other factors, affirmatively declare its admission policies and practices, state the number of its racially and religiously identifiable minority students and such other relevant data as is consistent with this opinion. *Id.* at 471.

tices of private parties. This affirmative governmental responsibility, first described in 1873 in the *Slaughter-House Cases*, 16 Wall. 36, 71, 21 L. Ed. 394, 407, was a recognition that the Fourteenth Amendment was designed "to give to [the Negro] race the protection of the general government in [the] enjoyment [of civil rights] whenever it should be denied by the states," *Strauder v. West Virginia*, 100 U. S. 303, 306 (1879).

In assuring strict compliance with this constitutional obligation, this Court has consistently condemned State inaction which has failed to protect the rights of black citizens. In *Burton v. Wilmington Parking Authority, supra*, the Court held unconstitutional the failure of Delaware to promulgate regulations assuring non-discriminatory service on the part of a restaurant to which it had granted a lease. As with the loan grantees in this case, the restaurant lessee in *Burton* was not subject to a State investigation of possible discrimination. Yet, in language particularly relevant to this case, the Court held:

> [No] State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be . . . 365 U. S. at 725.

The failure of the States to take steps to protect the rights of blacks to be free from discrimination has been a recurrent theme in cases reaching this Court. While the bulk of recent decisions has been in the area of school desegregation, *see*, e.g., *Norwood v. Harrison, supra, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), the repeated emphasis of the Court's decisions has been to condemn that kind of State indifference which may be characterized as a see no evil, hear no evil approach to race relations. *Anderson v. Martin*, 375 U. S. 393, 403-4 (1964). *See also Shelley v. Kraemer*, 334 U. S. 1, 20 (1948).

Against this array of caselaw, the respondents have contended throughout this litigation that they have no obligations, constitutional or otherwise, to investigate whether applicants for their loans are discriminating in employment against blacks.[4] To assume that this statement were accurate would mean, of course, that the Mississippi Textbook Purchasing Board could distribute free textbooks to the schools regardless of whether the schools discriminated against blacks. But this was the very argument which the Court unanimously rejected in *Norwood v. Harrison, supra,* 413 U. S. at 462. Therefore, the failure of the District Court and the Court of Appeals to remedy the respondents' continued refusal to investigate the employment practices of applicant companies was clearly erroneous. Since the respondents have defaulted in their constitutional obligations, it is appropriate for this Court to grant a Writ of Certiorari to remedy that State inaction. *See Swann v. Charlotte-Mecklenberg Board of Education, supra* ("Judicial authority enters only when local authority defaults," 402 U. S. at 16).

B. The Judgment-Order of the Court of Appeals Directly Conflicts With Decisions of Other Federal Courts Which Require Governmental Considerations of the Racial Practices of Private Parties Which It Subsidizes.

Not only is the Third Circuit's decision contrary to long-standing principles of this Court, but it also establishes a clear conflict among the Circuits.

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4. At page 21 of its Brief in the Court of Appeals, PIDA wrote: PIDA has no affirmative duties relating to employment discrimination by statute, regulaitons, or otherwise.

At page 3 of its Brief in the Court of Appeals, DCIDC wrote: DCIDC submits ioan application to PIDA in accordance with the [PIDA] statute but has no statutory nor regulatory obligations to investigate the employment policies of applicants for PIDA projects.

For example, the Eighth Circuit in *NLRB v. Mansion House Management Corp.*, 473 F. 2d 471 (1973) has held that the remedial machinery of the National Labor Relations Act, 29 U. S. §151 *et seq.*, cannot be available to a union which is unwilling to correct past practices of racial discrimination. There, the NLRB sought enforcement of an order requiring an employer to collectively bargain with a union which the employer alleged was guilty of discrimination against blacks. At the NLRB hearing, the trial examiner refused to consider these allegations of employment discrimination. *Id.* at 475. There, as here, there was no statutory requirement that compelled the NLRB to consider the issue of discrimination. Nonetheless, the court held that the NLRB was compelled by the Fifth Amendment to consider the alleged discriminatory practices of the union. *Id.* at 477.

Mansion House recognizes that it is the constitutional duty of the government, in the first instance, to develop and apply an institutionalized mechanism in order to ensure its non-participation with the racial discrimination of private parties. Similar holdings have been reached by the Fourth,[5] Fifth[6] and District of Columbia Circuits,[7] as well as numer-

5. *Bob Jones University v. Connally*, 472 F. 2d 903 (4th Cir. 1973) (Internal Revenue Service held constitutionally bound to investigate and withhold tax-exempt status from private schools discriminating against black students and teachers); *Simkins v. Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir. 1963), *cert. denied*, 376 U. S. 938 (1964) (federal grants to private hospitals enjoined because the hospitals segregated their facilities by race).

6. *United States v. State of Mississippi*, 499 F. 2d 425 (5th Cir. 1974) (en banc) (Mississippi enjoined from selling or leasing public property to private "white flight" schools which discriminated against black students); *Crenshaw County Private School Foundation v. Connally*, 474 F. 2d 1185 (5th Cir. 1973) (Internal Revenue Service prohibited from allowing tax exemptions to private schools unless those schools demonstrated a non-discriminatory admissions policy); *Gilmore v. City of Montgomery*, 473 F. 2d 832 (5th Cir. 1973) (city enjoined from allowing its facilities to be used by segre-

ous federal district courts.[8] They have required governmental consideration of the employment,[9] educational[10] and membership[11] policies of private parties in order to prevent the government from becoming a joint participant in prohibited, racial discrimination. *See also Moose Lodge No. 107 v. Irvis, supra,* 407 U. S. at 173.

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6. (Cont'd.)
gated private schools); *Wright v. City of Brighton,* 144 F. 2d 447 (5th Cir.), *cert. denied sub nom. Hoover Academy, Inc. v. Wright,* 404 U. S. 915 (1971) (lease and sale of public property to private, segregated school rescinded and city ordered to ensure future disposition of property only to non-discriminatory schools); *United States v. Hinds County School Board,* 433 F. 2d 598 (5th Cir. 1970) (School Board required to investigate and ensure that its sale of abandoned buildings to private schools did not involve it in the schools' segregated admissions policies).

7. *Kelsey v. Weinberger,* 498 F. 2d 701 (D. C. Cir. 1974) (Dept. of Health, Education and Welfare enjoined from providing federal school funds under the Emergency School Aid Act of 1972, 20 U. S. C. §§ 1610-1619, without first investigating and determining whether participating schools had adequate desegregation plans).

8. *Falkenstein v. Dept. of Revenue, State of Oregon,* 350 F. Supp. 887 (D. Or.) (three-judge court), *appeal dismissed,* 409 U. S. 1099 (1972) (Oregon enjoined from granting tax-exempt status to the Elks Lodge); *Green v. Connally,* 330 F. Supp. 1150 (D. D. C.) (three-judge court), *aff'd per curiam sub nom. Coit v. Green,* 404 U. S. 997 (1971) (Internal Revenue Service required to investigate the admissions policies of private schools prior to granting them tax-exempt status); *Poindexter v. Louisiana Financial Assistance Comm.,* 275 F. Supp. 833 (E. D. La. 1967) (three-judge court), *aff'd per curiam* 389 U. S. 571 (1968) (state enjoined from providing tuition grants to private schools discriminating against black students); *Ethridge v. Rhodes,* 268 F. Supp. 83 (S. D. Ohio 1967) (Ohio required to investigate the employment practices of private contractors and unions to ensure its non-participation with parties discriminating against blacks); *Lee v. Macon County Board of Ed.,* 267 F. Supp. 458 (M. D. Ala.) (three-judge court), *aff'd per curiam,* 389 U. S. 215 (1967) (state enjoined from granting tuition grants to private schools discriminating against black students).

9. *See* e.g., *Ethridge v. Rhodes, supra,* n. 8.

10. *See* e.g., *United States v. State of Mississippi, supra,* and *Green v. Connally, supra,* n. 6.

11. *See* e.g., *Falkenstein v. Dept. of Revenue, State of Oregon, supra,* n. 8.

The decision of the Third Circuit Court of Appeals in this case directly conflicts with each of these cited holdings. It permits PIDA to continue its policy of consciously disregarding the employment discrimination of its grantees. It thereby sanctions Pennsylvania's direct participation in the discriminatory employment practices of its loan recipients. This decision, therefore, justifies the grant of certiorari to resolve the conflict which it has created.

C. The Judgment Order of the Court of Appeals Raises Constitutional Issues of National Importance With Regard to Whether the States May Continue to Subsidize Private Businesses Which Discriminate in Employment Against Blacks.

It is now well documented that the economic condition of blacks is starkly inferior to whites. For example, in unemployment and income alone, statistics show that nationally since World War II the unemployment rate of blacks and other minorities has been double that of white workers; that the level of black income in 1970 was less than 60% of white income; and that nearly one-third of the blacks, as opposed to one-tenth of the whites, were living at or below the poverty level in 1969.[12]

The most recent report of the U. S. Department of Labor reveals that this trend is continuing. It shows that in November, 1974 the national non-white unemployment rate was 11.7%, while it was only 5.8% for whites.[13] Pennsylvania mirrors this national picture. Reported figures for 1973 indicate that non-white unemployment was

12. U. S. Dept. of Labor, *Black Americans: A Chartbook*, 14 (1971).

13. U. S. Dept. of Labor, Bureau of Labor Statistics, "Employment and Earnings," 60 (November 1974).

twice the white rate, and non-white income was less than 60% of white income.[14]

The expressed purpose of the PIDA Act is to mitigate the effects of critical unemployment figures like these through the transmission of State financed loans, at reduced interest rates, to private industry, Pa. Stat. tit. 73, § 302. In either the same, or slightly modified form, every other State in the nation has enacted similar legislation and created agencies similar to PIDA.[15] The intent of these State statutes is to increase the number of jobs available in the private labor market. In pursuit of that objective, Pennsylvania alone has lent over $239,000,000 to private employers between the years 1956 and 1971.[16]

It would be extraordinary, contrary to statutory intent, and unconstitutional, *see Cooper v. Aaron, supra,* 358 U. S. at 9, were these State funds used to promote or perpetuate discrimination in employment against blacks and other nonwhites. Yet, this very inconsistency, and the increase in minority unemployment resulting therefrom, is exactly the consequence of a State policy which is indifferent to the discrimination which grantees of State funds inflict upon minorities, *see Burton v. Wilmington Parking Authority, supra.*

Thus, by continuing to ignore private discrimination against blacks by their grantees, PIDA and other Sttae

14. U. S. Dept. of Labor, Bureau of Labor Statistics, "Geographic Profile of Employment and Unemployment 1973", Report 431, at 6 (1973).

15. *See,* e.g., Ch. 13, N. J. Stat. Ann.: 1B-15.75 *et seq.* (1948), *as amended* 13 N. J. Stat. Ann.: 1D-10 (1970); Ch. 9½ N. Y. Cons. Laws §§ 1 *et seq.* (McKinney 1941); 33 Cal. Code §§ 14990 *et seq.* (West 1972); 32 Conn. Gen. Stat. Ann. §§ 23a *et seq.* (1972). None of these statutes, and none of the PIDA-type agencies created under them, require the states to consider whether their subsidization of private industry is, in fact, a state subsidization of employment discrimination against blacks.

16. *See* petitioners' Trial Exhibit P-6, entitled "PIDA Report No. 32, Summary of Loan Projects, 1956-1971".

agencies like it actually contribute to the maintenance of that discrimination. First, the unemployment and income differentials that separate blacks and whites are no mere random fluctuation of the marketplace. Congress and various national commissions have concluded that they are the result of a pervasive pattern of employment discrimination against blacks by private employers.[17] In addition, the Pennsylvania Commission on Human Relations has determined after an investigation of approximately 13,000 employers that job discrimination in Pennsylvania is commonplace and widespread.[18]

Secondly, the effect of PIDA-type loans has invariably caused the relocation of corporate facilities from urban centers to suburban areas.[19] The effect of this kind of subsidization has been disastrous for urban employment in general and especially grievous for blacks and other minority workers who cannot relocate and find equal housing opportunities in the suburbs.[20]

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17. *See*, e.g., Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 92nd Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act* (1972); H. R. Rep. No. 718, 89th Cong., 1st Sess. 2-3 (1965); National Advisory Comm. on Civil Disorders (Kerner Comm.), *Report* 251-277 (Bantam ed. 1968); U. S. Commission on Civil Rights, *Equal Opportunity In Suburbia*, 1-71 (July, 1974).

18. *See* Petitioners' Appendix in the United States Court of Appeals for the Third Circuit, 390a-402a. As a result of its investigation, the Pennsylvania Human Relations Commission created a list of 85 employers targeted for future enforcement action. Respondent Chilton was ranked 23rd on that list.

19. *See* "PIDA Report No. 32, Summary of Loan Projects, 1956-1971," n. 16, *supra*.

20. The discriminatory effects of corporate relocation on blacks has been fully documented in several recent studies and articles. *See*, e.g., U. S. Commission on Civil Rights, *Equal Opportunity in Suburbia*, *supra* at 1-36; Suburban Action Institute, *Open Or Closed Suburbs: Corporate Location And The Urban Crisis* (1971); D. Ray, *Corporate Relocations To Exclusionary Suburbs—The New Dis-*

It was in recognition of these facts and its constitutional duties that the federal government, in sharp contrast to the States, promulgated legislation and regulations designed to ensure that federal funds were not being transmitted to companies that discriminated in employment against minorities. For example, Title VI of the 1964 Civil Rights Act prohibits discrimination by private parties who receive federal funds for employment training programs, 42 U. S. C. § 2000d *et seq.* It also provides for fund termination if, after investigation, it is determined that a recipient has practiced racial discrimination in its employment policies, 42 U. S. C. § 2000d. Similar prohibitions and provisions are contained in the Emergency Employment Act of 1971, 42 U. S. C. § 487 *et seq.* (1972 Supp.), the Omnibus Crime Control and Safe Streets Act of 1968, 42 U. S. C. § 3711 *et seq.* (1970), as amended, 87 Stat. 197 (1973), and the State and Local Fiscal Assistance Act of 1972, 86 Stat. 919 (1972) (the Revenue Sharing Act).

In addition to legislation, numerous Executive Orders prohibit employment discrimination on the part of businesses contracting with the federal government. The first, Order 8802, was signed into law by President Franklin D. Roosevelt on June 25, 1941, 6 Fed. Reg. 3109. The most recent, Order 11,246, 30 Fed. Reg. 12319 (1965), *as amended* by Order 11,375, 32 Fed. Reg. 14,303 (1967), requires nearly every company doing business with the federal government to demonstrate not only that it is not discriminating against minorities and women, but also that it has an approved "affirmative action" plan for hiring minorities and women on all of its jobs.[21] To ensure compliance with this Execu-

20. (Cont'd.)
guise For Discrimination (Suburban Action Institute, 1972); A. Blumrosen, *The Duty to Plan For Fair Employment: Plant Relocation In White Suburbia*, 25 Rutgers L. Rev. 383 (1971).

21. Affirmative action plans designed to implement the provisions of Executive Order 11,246 have withstood challenges in the following

tive Order, supervision is vested in the Office of Federal Contract Compliance, a part of the U. S. Department of Labor, 31 Fed. Reg. 6921 (1966). In addition, all federal agencies have contract compliance divisions to investigate and ensure adherence by contractors with the non-discrimination provisions of Order 11,246.[22]

PIDA's policy of indifference and its resulting subsidization of the employment discrimination practiced by its loan recipients stand in sharp contrast to these active and remedial policies of the federal government. PIDA's conscious disregard of the discriminatory effects of its lending practices manifests the kind of "arbitrary . . . thoughtlessness [that] can be as disastrous . . . as the perversity of a willful scheme," *Hobson v. Hanson*, 269 F. Supp. 401, 497 (D. D. C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F. 2d 175 (D. C. Cir. 1969). As such, it is a violation of the Equal Protection Clause of the Fourteenth Amendment, *Norwood v. Harrison, supra*. The Judgment-Order of the Court of Appeals, however, permits PIDA's active indifference to continue unabated. It also permits other States with PIDA-type agencies to consciously disregard the racially discriminatory effects of their industrial loan programs to private industry. It should therefore be reviewed by this Court.

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21. (Cont'd.)

cases: *Associated General Contractors of Mass., Inc. v. Altshuler*, 490 F. 2d 9 (1st Cir. 1973), *cert. denied* 42 U. S. L. W. 3593 (April 22, 1974); *Illinois Builders Ass'n. v. Ogilvie*, 471 F. 2d 680 (7th Cir. 1972); *Contractors Association of Eastern Pennsylvania v. Schultz*, 442 F. 2d 159 (3rd Cir.), *cert. denied* 404 U. S. 854 (1971), *Joyce v. McCrane*, 320 F. Supp. 1284 (D. N. J. 1970).

22. At the trial of this case, the contract compliance specialist of the U. S. Defense Supply Agency, with which respondent Chilton had federal contracts, testified that he had twice rejected Chilton's affirmative action hiring plan for non-conformance with federal requirements.

VII. CONCLUSION.

For each of the foregoing reasons, it is respectfully submitted that this Court should grant this Petition for a Writ of Certiorari to review the Judgment-Order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 72-774.

NADINE LOUIS, BY HER MOTHER AND NATURAL GUARDIAN, MAY LOUIS; WEST PHILADELPHIA BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

v.

THE PENNSYLVANIA INDUSTRIAL DEVELOPMENT AUTHORITY: THE DELAWARE COUNTY INDUSTRIAL DEVELOPMENT CORPORATION: AND THE CHILTON COMPANY.

OPINION.

DITTER, *J.* January 18, 1974

This civil rights action was brought to force Pennsylvania to develop standards to judge whether there is discrimination against Blacks by companies which apply for state aid. The matter comes before the Court for de-

cision after a consolidated hearing on plaintiffs' motion for a preliminary injunction and a full hearing on the merits of the complaint pursuant to Federal Rule of Civil Procedure 65(a)(2).

The plaintiffs are seven individuals and the West Philadelphia Branch, National Association for the Advancement of Colored People. Named as defendants are the Pennsylvania Industrial Development Authority (PIDA), the Delaware County Industrial Development Corporation (DCIDC), and the Chilton Company, an industrial firm with its principal place of business in Philadelphia. That part of the case presently before me for decision is the allegation that PIDA and DCIDC are violating the Civil Rights Acts of 1866 and 1871, 42 U. S. C. 1981 and 1983, and the Fourteenth Amendment to the United States Constitution by failing to consider whether business enterprises receiving PIDA loans are unlawfully and unconstitutionally discriminating against minorities. Plaintiffs seek to enjoin permanently PIDA and DCIDC from processing, approving, and granting loans until such time as said defendants develop criteria and procedures to determine whether applicants for their loans are discriminating against minorities.

I. Background.

Since 1956, Pennsylvania has underwritten a statutory program [1] designed to attract and keep industry within its borders. As the administering office, PIDA makes loans, through local industrial development agencies such as DCIDC, to companies which locate in critical economic areas. PIDA can loan 40 or 45% of the cost of a project (depending on the type of project) at a very low rate of interest. There is no provision in the statute for investi-

1. See Pennsylvania Industrial Development Authority Act, 73 P. S. § 301 *et seq.*

gating whether or not a benefiting company discriminates against minorities in employment. PIDA has not instituted any such investigatory process, there is no provision in its budget for such a procedure, and there have been no complaints to PIDA that any of the loan recipients discriminated against minorities. Nevertheless, there is an anti-discrimination clause in the closing documents for all PIDA loans.[2] There have been no defaults under these provisions.

During June and July of 1971, DCIDC applied to PIDA for $4,080,000 to help finance the construction of new facilities for the Chilton Company in Radnor Township, Delaware County.[3] Chilton, primarily a publisher, printer and market researcher, is a Delaware corporation with its principal offices at 56th and Chestnut Streets, Philadelphia.

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2. In granting loans, PIDA sets forth in its commitment letter:

> "A condition of the disbursement of the loan is that there shall be no discrimination against any employee in establishing the project, or against any applicant for project employment because of race, religion, color, national origin, sex or age. This provision shall include, but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship . . . You shall cause these provisions, or ones similar thereto, to be inserted in all project contracts."

This non-discrimination paragraph has been included in PIDA's commitment papers since December of 1971 or January of 1972, at the request of the Governor's office (N. T. p. 111, 5/11/72, and Defendants' Exhibits 5, 6, and 7).

The above conditions relating to non-discrimination must be certified to by benefiting companies and included in closing documents, or no funds from PIDA would be available (N. T. p. 128, 5/10/72; Defendants' Exhibits 5, 6, and 7).

3. On June 23, 1971, DCIDC made an initial application to PIDA for $2,600,000 to partially finance construction of new facilities for Chilton. This application was denied because PIDA felt Chilton was merely relocating part of its operation within the state. Aiding a company to move within the state is not considered part of PIDA's task of keeping and attracting industry. See 73 P. S. § 307(k). Such a proposal would involve the state in redistributing jobs within the Commonwealth, to the detriment of the losing area.

It also has facilities at 401 Walnut Street, Philadelphia, and One Decker Square, Bala Cynwyd, as well as an office in Pittsburgh. At the time of this suit, Chilton employed 1115 people at 56th and Chestnut, of which 17.5% were black; 305 employees at One Decker Square, of which about 1.6% were black, and 60 employees at its offices at 401 Walnut, of which about 10% were black.[4] Chilton had been seriously considering moving its operations to the State of Delaware. Had it done so, approximately 1500 jobs would have been lost to the Philadelphia area. The purpose of the PIDA loan was to provide an incentive to keep Chilton from leaving the Commonwealth. PIDA tentatively confirmed its loan to Chilton in August, 1971, and finally approved it, December, 1971, or January, 1972.[5]

On April 20, 1972, this suit was filed, seeking to stop the Chilton loan, as well as all other PIDA loans. Plaintiffs contend first that by failing to consider whether businesses receiving PIDA loans are discriminating against Blacks, PIDA and DCIDC are violating 42 U. S. C. §§ 1981, 1983, and the Fourteenth Amendment to the United States Constitution. Second, plaintiffs allege that Chilton discriminates against Blacks in its employment practices, and in its attempt to relocate its offices outside of Philadelphia, in violation of 42 U. S. C. § 1981. Third, plaintiffs contend that PIDA and DCIDC fostered and promoted the discrimination practiced by Chilton by processing and approving its loan application in violation of 42 U. S. C. §§ 1981, 1983 and the Fourteenth Amendment. Finally, plaintiffs contend that all of the defendants have violated the Thirteenth Amendment.

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4. These figures and percentages were taken from paragraph 21 of Chilton's answer and plaintiffs' exhibit 9—Equal Employment Opportunity, Employer Information Report EEO-1, dated April 29, 1971.

5. N. T. p. 133-34, May 10, 1972.

To correct these wrongs, plaintiffs sought a declaratory judgment declaring the alleged discriminatory acts of all defendants to be in violation of the law; temporary and permanent injunctive relief enjoining the Chilton loan; permanent injunctive relief preventing PIDA and DCIDC from making any loans until standards and procedures are set up to determine whether applicants for loans are discriminating against minorities; an injunction against discrimination aimed at Blacks allegedly practiced by Chilton; a requirement that Chilton adopt an affirmative action plan; and a requirement that Chilton employ plaintiff, Nadine Louis.

At this time the only issue before me is whether PIDA must develop criteria and procedures to determine whether applicants for loans are discriminating against minorities.[6] By informal agreement among counsel, all other issues involving PIDA, DCIDC and Chilton have been tentatively resolved. This settlement will become final after a decision concerning PIDA's standards. However, all parties agree that this tentative settlement is not to affect plaintiffs' standing.

II. The Plaintiffs.

The threshold question in this case concerns the plaintiffs, their allegations, and their proofs.

The concept of standing requires that plaintiffs demonstrate that they have been injured. Here the NAACP, appearing as an organization seeking to represent its members, alleges a long history of concern in racial and civil rights problems, and claims a "direct and immediate interest in eliminating discrimination."[7] These averments

6. All counsel have represented to me that the record is complete on this issue, as to both preliminary and final relief.

7. Complaint, paragraph 32.

were expanded to recite the NAACP's advice and assistance to unemployed members seeking work.[8] In addition, the intervenor plaintiffs allege that this organization is a source of aid and advice to those seeking jobs. However, despite interest and history, there is no allegation of injury to the NAACP or its members. The record is barren of evidence that any member was ever denied employment at Chilton. Since there is neither allegation nor proof that a single member has been injured, *NAACP v. Button*, 371 U. S. 415, 83 S. Ct. 328 (1963) is not in point. In order to represent its members, an organization must allege harm or injury to them. The NAACP stands in the same position as did the Sierra Club in *Sierra Club v. Morton*, — U. S. —, 92 S. Ct. 1361 (1972). It has no personal stake in the controversy, and thus lacks the required standing to be a plaintiff here. *Id.* at —, 92 S. Ct. at 1364-1369.

Plaintiff, Nadine Louis, did not appear as a witness at the hearings in this case, but her testimony was received through deposition. On August 5, 1970, while a 17 year old junior in high school, Miss Louis handed a job application form to a security guard at the Chilton plant. Although the guards are *not* Chilton employees, her application for employment in the research department was delivered to the personnel office. The form indicated that the plaintiff expected to graduate from high school in 1971, and the application was therefore deemed to be one for either temporary summer work or for part-time work after school. Since neither type of employee was being hired at that time, the form was placed with the part-time applications. In the event that a need for part-time employees arose during the next three months, her application, along with any others received during that period, would have been available to the personnel department.

8. Amended complaint, paragraphs 32(a) and 32(b).

Several weeks later, Miss Louis stated that she placed a telephone call to Chilton. While waiting for the switchboard to connect her with the personnel office, she was apparently disconnected. She made no further attempt to contact the defendant. She did not call again, come to Chilton for an interview, write, or in any other manner make any inquiry as to the status of her application. Chilton sent no letter to Miss Louis, but apparently treated her application in accordance with the standard policy of the company, which necessitated not acknowledging the large number of unsolicited applications unless and until a job opening existed. Nothing more was heard from or regarding Nadine Louis or her application until April 20, 1972, when the instant civil rights action was filed. Her entire assertion that Chilton discriminates against Blacks, and thus the foundation for this action, is based on the events just related. The illogic and tenuity of this argument is readily apparent. No possible interpretation of the above facts would allow a finding that Nadine Louis was the victim of discrimination by Chilton.

Two petitions were presented both during and after the hearings in this case to allow six additional persons to intervene as party plaintiffs. I granted both requests.

In their petitions the intervenor plaintiffs alleged that they were either fired or not hired because they were Black. No evidence was presented at the hearings, nor has anyone asked for additional opportunity to present facts to substantiate these claims. Mere allegations are not sufficient to support a claim for relief. Thus, the intervenors add nothing to this case.

In short, there has been no proof that Chilton discriminated against any of the plaintiffs.[9] In the absence

9. Plaintiffs' counsel did not assert that there was evidence of injury to any plaintiff, but contended that none was required. In counsel's view, it is sufficient if there is an allegation of "injury in

of a personal stake in the outcome of the controversy, there is no Article III jurisdiction: *Flast v. Cohen,* 392 U. S. 98, 101, 88 S. Ct. 1942, 1953 (1968). See also *O'Shea v. Littleton,* — U. S. —, 94 S. Ct. —, 42 L. W. 4139 (1974).

As the Supreme Court has recently said, "In *Sierra Club* [10] we went on to stress the importance of demonstrating that the party seeking review be himself among the injured, for it is this requirement that gives a litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of the value judgments of concerned bystanders." *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), — U. S. —, 93 S. Ct. 2405 (1973).

While a party may seek redress for injury to himself, he may not bring an action for injury done to others: *Moose Lodge No. 107 v. Irvis,* — U. S. —, 92 S. Ct. 1965, 1968 (1972). In the absence of an injured party, no decision on the merits can be made. Id. at — U. S. —, 92 S. Ct. 1967. See also *Ray Barllie Trash Hauling, Inc. v. Kleppe,* 477 F. 2d 696 (5th Cir. 1973), and *York-Shipley, Inc. v. Atlantic Mutual Insurance Company,* 474 F. 2d 9 (5th Cir. 1973).

III. Plaintiffs' Contention and Statistics.

Although a decision on the merits is precluded because plaintiffs have suffered no injury, a consideration of their principal assertion reveals they have shown nothing which would warrant the relief they seek against PIDA.

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9. (Cont'd.)
fact," a term found in cases brought under the judicial review provisions of Administrative Procedure Act, 5 U. S. C. §§ 701-706, to have administrative agency decisions set aside. This is not such a case.

10. *Sierra Club v. Morton,* — U. S. —, 92 S. Ct. 1361, 1366 (1972).

Plaintiffs have alleged that Chilton discriminates against Blacks. Plaintiffs then assert that the Commonwealth of Pennsylvania may not be a joint participant in private discrimination against Blacks. I agree with this abstract proposition for the reasons set forth in *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 81 S. Ct. 856 (1961), and *Simkins v. Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir. 1963), cert. denied 376 U. S. 938 (1964).

Plaintiffs go further, however, and contend whether or not they have shown discrimination on Chilton's part, all PIDA loans, including Chilton's,[11] must be halted until PIDA develops standards to detect if businesses receiving its loans discriminate. Here, I disagree.

This action was instituted to enjoin distribution of a $4,080,000 PIDA loan to Chilton, a loan for which a letter of committment had been given several months before. Based on the assurance that the PIDA money would be available when needed, Chilton went ahead with its $10,200,000 Delaware County construction project. Work had already been started and was well underway by the time plaintiff brought suit. Enjoining the loan would stop the work and possibly force eventual abandonment of Chilton's plans. The effect on Chilton might be disastrous with the possibility that 1500 people could lose their jobs. In view of the stakes, I conclude the plaintiffs must prove private discrimination exists before the state can be enjoined, its executive branch subjected to federal control, and the seeds of economic havoc sown.

Plaintiffs contend that the rationale in *Shannon v. United States Department of Housing and Urban Development*, 436 F. 2d 809 (3rd Cir. 1970), supports their position.

11. The settlement reached by the parties as to Chilton does not change this contention on the part of plaintiffs. It was agreed that this settlement would not affect plaintiffs' rights.

In *Shannon*, the Court of Appeals held that HUD had an affirmative duty to achieve fair housing. In reaching this decision the Court stated:

> "Read together, the Housing Act of 1949 and the Civil Rights Acts of 1964 and 1968 show a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight. In 1949, the Secretary, in examining whether a plan presented by a LPA included a workable program for community improvement, could not act unconstitutionally, but possibly could act neutrally on the issue of racial segregation. *By 1964 he was directed, when considering whether a program of community development was workable, to look at the effects of local planning action* and to prevent discrimination in housing resulting from such action. *In 1968 he was directed to act affirmatively to achieve fair housing.* Whatever were the most significant features of a workable program for community improvement in 1949, by 1964 such a program had to be nondiscriminatory in its effects, and *by 1968 the Secretary had to affirmatively promote fair housing.*" 436 F. 2d at 816 (emphasis added).

The heart of the *Shannon* decision is that HUD had not carried out the Congressional policy set forth in the Housing Act of 1949 and the 1964 and 1968 Civil Rights Acts, and had failed to show *its* own regulations. The plaintiffs argue by way of "analogy and juxtaposition, PIDA . . . cannot comply with the requirements of the Fourteenth Amendment unless it develops criteria and standards to determine if businesses receiving its loans are discriminating against Blacks."[12] The plaintiffs are trying to force

12. Plaintiffs' Memorandum of Law in Support of their Motion for a Temporary Restraining Order, page 5.

the factual setting of this case into the mold formed by *Shannon*. The differences between the two are obvious. HUD is a Federal agency, with statutory, affirmative duties imposed by federal law as recognized by HUD's own regulations. PIDA has no statutory, affirmative duties relating to employment discrimination and is a state agency. While it is true that Pennsylvania may not use PIDA as an instrument of discrimination, it does not follow that the State is doing so just because these plaintiffs consider PIDA's methods to prevent private discrimination unreliable.

Plaintiffs attempted to show discrimination at Chilton by introducing statistics taken from Chilton's reports to the Equal Employment Opportunity Commission (EEOC).[13] Plaintiffs assert that because Chilton's Black employees do not equal 35% of its total employees, at ratio equivalent to the Black-White population of Philadelphia, and because there are only a small number of Blacks in the top-job categories, they have shown enough to prevail.

Plaintiffs position is based upon the theory that *valid* statistical evidence may be used to establish a prima facie case of discrimination, thus shifting the burden of proof to the defendant to rebut any adverse inferences. However, in those cases where it was held that statistics justified a change in the burden of proof, there were great disparities in overall minority employment as compared to population. For example, in *Parham v. Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970), Blacks represented only 1.82% of a work force number 3,074.

13. In plaintiffs' complaint and various other papers filed, they set forth statistics which vary from those in the EEOC Reports. However, those statistics were never substantiated, whereas the EEOC Reports were actually admitted in evidence at the hearing by the plaintiffs. Similarly, Chilton set forth different figures in its answer to the complaint (apparently just a change in personnel numbers since the EEOC report for 1971 was filed), but these were not substantiated at the hearing either.

At Chilton, there is no comparable disparity and thus a need for evidence to show some correlation between jobs and available Black workers. Plaintiffs produced no such testimony. Instead they urge that since 35% of Philadelphia's population is Black, Chilton must be discriminating unless 35% of its employees are Black. Chilton, on the other hand, presents that which on its face seems a more reasonable argument: a comparison should be made between Chilton employees and the percentage of Blacks in the total pool of available manpower in the Standard Metropolitan Statistical Area, as established by the Bureau of Census, of which Philadelphia is a part, i.e., 18.05%. Perhaps had a statistician testified or had there been some other evidence to show why the number of children, old people, the disabled, and all others not available to work should be ignored when evaluating the ratio between Black population and Black employees at Chilton, a different result might be possible. On the present record, however, a mere comparison between jobs and population proves nothing.[14] The same is true so far as Chilton's top-level jobs are concerned. For example, how many Blacks in the Philadelphia Standard Metropolitan Statistical Area are available to fill the highly skilled positions at Chilton such as editor, publisher, or technical writer? Quite possibly there are many Black persons with these abilities, but plaintiffs have failed to produce evidence that there are any at all. See Fiss, *A Theory of Fair Employment Laws,* 38 U. Chi. L. Rev. 235, 277 (1971).

While in some cases figures may be the only proof available to show deliberately concealed, racially biased

14. By way of illustration: it is statistically true that there have been no forest fires on Manhattan Island since the "Smokey the Bear" advertisements have been displayed in New York subways. However, it is not commonly accepted that this statistic proves the value of advertising.

policies and actions, ". . . as is the case with all statistics, their use is conditioned by the existence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination to be drawn." *United States v. Ironworker's Local 86*, 443 F. 2d 544, 551 (9th Cir.) cert. denied 404 U. S. 984 (1971). In a recent decision involving alleged employment discrimination by the Philadelphia police department, the Third Circuit Court of Appeals expressed its doubts over the lack of evidence about the significance of statistics and the use of "speculation" by the court in analyzing that type date. *Commonwealth of Pennsylvania, et al. v. O'Neill, et al.*, 473 F. 2d 1029 (3rd Cir. 1973). The comments of Chief Judge Northrop in a recent employment discrimination case, are applicable here:

> "While it is true that a plaintiff may employ valid statistical evidence to establish a prima facie case of racial discrimination and thus shift the burden to the defendant to refute the inference of discrimination [citations omitted], plaintiff's use of statistics in this case falls far short of establishing a prima facie case. Here the plaintiff merely asks the Court to take judicial notice of a population percentage of questionable validity and attempts to meet her burden in this manner. Assuming that judicial notice is taken of this percentage, it does not establish a prima facie case when such a figure is compared to the percentage of blacks employed by the defendant; for plaintiff makes no effort to show the percentage of black electrical engineers, black Ph.D.'s, black draftsmen, black electrical technicians, or black secretaries in Baltimore, or to show the number of blacks that have applied with the defendant and have been rejected in each job classification. At this juncture it is not necessary to determine the

quantum of statistical evidence necessary to successfully shift the burden, for it is sufficient to hold that *mere citation of a general population figure without adequate correlation* will not suffice." *McAdory v. Scientific Research Instruments, Inc.*, 355 F. Supp. 468, 475 (D. Md. 1973) (emphasis added).

Plaintiffs maintain, however, that the testimony of Clarence E. Cyrus, a contract compliance specialist with the Defense Supply Agency, supports their case and statistics. It does not.

Called by Chilton in defense, Mr. Cyrus explained that every contractor doing business with the government, who either employs more than 50 persons or has a contract for more than $10,000 is subject to Executive Order 11246. That order provides that such a "contractor will take affirmative action in hiring minorities, . . . establish policy and procedures that will not discriminate against minorities, . . . develop an affirmative action program in writing . . ." (N. T. 7/12/72, p. 46). Two affirmative action plans submitted by Chilton under the requirements of Executive Order 11246 had been rejected by DSA, but this does not constitute proof of racial discrimination. Rather, it goes to establish that there should be more active assistance to minorities by Chilton if it wishes to continue doing business with the United States.

More in point was Cyrus' testimony that he was familiar with employment practices at Chilton and that he had not seen any evidence of racial discrimination with regard to employment or promotion (N. T. p. 44).

In the instant case, there has been no direct evidence that the plaintiff, Nadine Louis, the intervenor plaintiffs, or anyone else was denied employment or promotion because of race. There has been no expert testimony to explain,

validate or correlate any statistical data. What evidence there is is insufficient to show discrimination by Chilton or to shift the burden to defendant to explain its employment practices.

IV. The Human Relations Commission.

Plaintiffs presented five witnesses at the hearing on this matter. Four testified as to the absence of any pre-loan racial discrimination investigation by PIDA. The fifth witness was Neil Thomas, a consultant for the Pennsylvania Human Relations Commission (HRC). The majority of his testimony was related to a project he headed for the study of employment discrimination in Pennsylvania. The project began three years before with HRC's selection of 25 companies for enforcement action (N. T. p. 8).[15] Based upon the experience of the HRC with these firms, a set of interrogatories was developed which would reveal a company's employment practices. In addition, HRC learned in a general way how to administer the statute from these cases (N. T. 9).

As a result of the work done as to these 25 employers, the HRC decided to "pick and choose" targets for its enforcement actions (N. T. p. 27). A set of criteria was developed which included the size of the company, the disparities between minority employment and minority population in the surrounding areas, similar disparities as to women in the work force, and other indices not specifically described (N. T. p. 30). In its written memo, "EEOC Project Report—Analysis of Targets," D-10, two criteria were described: one ignored Commission experience and judgment and sought only the biggest pay-off in the terms of jobs for minorities and women; the other was based

15. Thomas testified on May 11, 1972.

strictly on HRC's experience and judgment.[16] The targets were selected in this way so HRC could bring enforcement action which would eliminate the most discrimination with the least expenditure of its resources (N. T. p. 27). The purpose was to attack discrimination on a "wholesale" basis (N. T. p. 33).

Specifically, the EE01 forms of 13,000 Pennsylvania employers were analyzed and 550 were selected by the HRC as being "the most likely companies to have the most pervasive discriminatory practices based upon the information that was available" (N. T. p. 30). To these 550 employers, HRC sent a questionnaire seeking further information. Approximately 90% responded to this request. There was no follow-up as to those which did not answer the questionnaire because HRC's purpose was only to get a "rough idea for planning purposes, not to be in anyway totally and completely comprehensive." (N. T. p. 76). Based upon this additional information, the list of 550 firms was further refined by apparently applying the same standards and additional information,[17] until there were only 85 employers remaining, two or three of which were among the 55 that did not respond to the questionnaire (N. T. p. 76).

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16. "It is unlikely that all 100 targets for Commission initiated pattern and practice cases will be started at the same time. Therefore two basic criteria for the ranking of companies has (sic) been developed. The first criterion is based on an analysis of the pay-off in terms of number of jobs that can possible (sic) be acquired for minorities *and women* in any given company or organization. *This analysis does not take into consideration Commission experience with any company or its judgment of the general effects of a company's policies on a community. The second criterion for selection, the* Commission's *experience and judgment, will have to be super-imposed by Commission staff* on the strictly statistical comparisons contained in this report." (Emphasis added.)

17. Apparently this additional information included complaints to HRC for 10 years, complaints to the EEOC, datad from 80 staff members, and studies from a network of voluntary citizen advisory councils throughout the Commonwealth (N. T. pp. 31-32, 47).

The undated list of 85 employers selected for enforcement action was completed by mid-Winter, 1971-72. Chilton's name did not appear on it, although Chilton had answered the second request for information on October 6, 1971 (N. T. p. 39, 42). After suit was started in this case, Chilton's name was added to the list (N. T. p. 49), having been omitted by the "purest coincidence" in part because Chilton's information was received on October 6, rather than in September (N. T. p. 51). In any event, HRC determined that Chilton should have been No. 23 on its selected target list.

Plaintiffs assert that Thomas' testimony validates and gives meaning to their statistical evidence or in and of itself shows Chilton discriminates against Blacks. Neither is the case.

In the first place, as Thomas plainly said, HRC's purpose was to compile a list of targets. It has made no official determination that Chilton discriminates (N. T. p. 59). HRC wanted to get a rough idea for planning purposes, not be totally complete and comprehensive. It was interested in conserving its own resources and attacking discrimination on a wholesale basis. HRC's rough ideas add nothing to plaintiffs' statistics.

Secondly, Chilton's rank of twenty-third on HRC's list has no evidentiary value. It does not establish, as plaintiffs contend, that "Chilton ranks 23rd worst in terms of employment discrimination in the Commonwealth,."[18] The twenty-five companies on HRC's first list were not on its second target list. Thus, Chilton may have really ranked 48th in HRC's priority. Only two or three of the 55 companies which failed to answer the second questionnaire were included as HRC targets, although their refusal to provide additional data in HRC's judgment might permit

18. Document 57, p. 6.

the inference that the information, if supplied, would have been unfavorable to those companies (N. T. p. 77). Perhaps some or all of those 52 or 53 may have been more deserving of HRC's attention than was Chilton, and thus Chilton should have been ranked between No. 75 and No. 100. If Chilton's rating had been eighty-sixth or above, it would not have been listed at all[19] since the last 15 of the 100 targets were unions. More importantly, whether Chilton should be twenty-third, forty-eighth, one hundredth, or not on the list at all is quite meaningless so far as this case is concerned. The list was compiled by persons who did not testify. It was based in part on their experience and judgment neither of which was described for me. In turn, these unknown persons relied upon complaints, some of which may have been 10 years old, staff "data," and upon "studies," whatever they are, supplied by a network of volunteer citizen advisory councils. In short, there was considerable mystery as to when, why, and in which way who decided what about whom.

Thirdly, when HRC turned its turrets toward its targets, it cranked into its fire control computer a factor which is not germane to this case, i.e., alleged discrimination as to women (N. T. pp. 47, 55, 56, 69, and 70). This suit deals solely with alleged discrimination as to Blacks and thus HRC's determinations are irrelevant.

Fourth, HRC's figures as to alleged minority employment discrimination were relative and not absolute. HRC's list was compiled by comparing the number of minority employees to minority population, not by comparing minority employees to available minority workers (N. T. pp. 69-70, 95-98). While HRC's method may provide a satisfactory way to rate one company against another since the

19. A more reliable way to have avoided being an HRC target would have been to refuse to answer HRC's questionnaire.

same mistake is repeated as to all, it does not yield a true picture as to whether there is discrimination or not.[20]

Finally, HRC was going after big companies per se. There may have been hundreds of smaller concerns with records of discrimination far worse than Chilton's. HRC simply ignored them.

Thomas' testimony was not devoid of interest, however. Hearing him justify HRC's failure to follow up on an earlier contact with PIDA because HRC was busy with its budget was a classic description of bureaucracy confronting its moment of truth. Despite the statutory duty imposed on HRC to "make recommendations to agencies and officers of the Commonwealth," 43 P. S. §957, and despite the fact that the Courts of Pennsylvania have declared the responsibility to regulate employment practices in the Commonwealth rests on HRC rather than other state agencies,[21] first things first. As Mr. Thomas put it, "it just happens—it happens that the time period to which you are referring is our budget time period . . . There are matters, frankly, that are more important such as our budget." (N. T. p. 83).

For my own part, I cannot help but speculate: If HRC had not been so preoccupied with its budget, would a simple phone call from HRC to PIDA have made this case unnecessary? After all, both PIDA and HRC are parts of the same executive branch of the same state government. Both have offices in Harrisburg. It does seem a bit circuitous to communicate with each other via a federal court in Philadelphia.

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20. If 550 children are all measured with the same yardstick, the tallest 100 can be identified even if the yardstick is an inch too short. If this error is ignored, however, no child's actual height will be correctly computed.

21. *N. A. A. C. P. v. P. U. C. and Philadelphia Electric Company*, 5 Commonwealth Ct., 312, 317 (1972).

In view of the fact that HRC was created to bring an end to discrimination, it was fascinating to hear Thomas explain why Chilton's request for an opportunity to discuss its equal employment opportunity projects was ignored—as are all such requests for help from all employers (N. T. p. 64). As Thomas put it, once the HRC has made a study and decided to go after an employer, HRC's role is like that of a district attorney (N. T. pp. 99-101, 109-110). I could find nothing in the Pennsylvania Human Relations Act which suggested the legislature believed that discrimination could better be ended by attack than advice, or that prosecution was preferred to persuasion. I gather from what Thomas said that others have this same trouble. In all fairness to Thomas, though, the fact that he added nothing to plaintiffs' case was hardly his fault. HRC's list was no more intended to prove anything in court than is a target sleeve towed behind a drone intended to carry passengers.

V. Conclusion.

In summary, this is a matter in which plaintiffs, who were not injured, relied on precedent, *Shannon*, which is not applicable, and brought suit to end discrimination which they did not show existed. It is also quite possible that they sued the wrong state agency. In any event, their prayer for relief against PIDA must be denied.

This opinion shall constitute my findings of fact and conclusions of law, and an order shall be entered accordingly.

ORDER.

AND NOW, this 18th day of January, 1974, plaintiffs' prayer for an injunction is hereby refused.

By THE COURT:

J. WILLIAM DITTER, JR.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 74-1300.

NADINE LOUIS, BY HER MOTHER AND NATURAL GUARDIAN, MAY LOUIS, ET AL.,
Appellants

v.

THE PENNSYLVANIA INDUSTRIAL DEVELOPMENT AUTHORITY, ET AL.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D. C. No. 72-774)

Argued September 19, 1974
Before: VAN DUSEN, HUNTER and WEIS, *Circuit Judges.*

JUDGMENT ORDER.

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.[1]

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1. In view of the record on the merits, it is unnecessary for us to pass on the part of the district court's opinion dealing with standing, about which we have some doubts. *See* Schiaffo v. Helstoski, 492 F. 2d 413, 423 (3d Cir. 1974).

Costs taxed against appellants.

By THE COURT,

JOSEPH F. WEIS, JR.,
Circuit Judge.

Attest:

THOMAS F. QUINN,
Clerk.

DATED: October 11, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 74-1300.

NADINE LOUIS, BY HER MOTHER AND NATURAL GUARDIAN, MAY LOUIS, ET AL.,
Appellants

v.

THE PENNSYLVANIA INDUSTRIAL DEVELOPMENT AUTHORITY, ET AL.

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

JOSEPH F. WEIS, JR.,
Judge.

Dated: October 31, 1974